IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1848

GERALD SPRAYREGEN,
Petitioner,

—v.—

UNITED STATES OF AMERICA,
Respondent.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In summation, the prosecutor, over objection, consistently expressed his personal belief and opinion that the defendant was a liar on the witness stand and had been lying throughout his testimony. Among the statements of personal belief and opinion were the following:

> It is basically that document, ladies and gentlemen, which marks the beginning of the attempt to cover up Mr. Sprayregen's participation in these crimes, and Mr. Spengler's at that time. It is an attempt which continues, I suggest to you, right up to this very moment as the defendant sits there now. It includes the act which you saw on direct examination and it includes the lies which you saw on cross-examination by Mr. Sprayregen.
>
> MR. FLEMING: I object to that.

THE COURT: Overruled.

* * * *

Then I would ask you to compare that [the testimony of the government witness], . . . with the testimony of that man, the defendant, who stood up there—and I don't hesitate—and bald facedly lied to you repeatedly.

* * * *

Ladies and gentlemen, that man would tell you the sky was green if it would permit him to escape conviction here. . . . He will sit there and tell you that your skin is blue if he thinks it will get him off.

* * * *

I ask you, ladies and gentlemen, whose motive in this case was there to tell the truth? Who tried to tell it as best as they can remember it? Who was straightforward and answered questions by both attorneys without being evasive? Who, if anyone, just plain lied to you?

* * * *

You contrast the testimony of Mr. Sam Cardiello and the conduct of that man on the stand in this case. It wasn't an innocent man blowing up and laboring under false characterizations. They were outright lies.

* * * *

I couldn't get a straight answer out of him for the life of me, and I ask you, ladies and gentlemen, if he is evading all those things and he is lying about some of the things I have pointed out, what else do you think he is lying about?

Do you think he is lying about the fact that he directed the submission of those false financial statements?

* * * *

Ask yourselves, ladies and gentlemen, why was he lying about that; why was he so anxious to avoid that?

* * * *

Why was he lying. I think it is fairly clear he was lying because he did not want to find out . . . .

* * * *

When Mr. Sprayregen said it was at the accountant's insistence, he was not telling you the truth.

* * * *

Having been caught in a flat-out right lie . . . .

* * * *

I already mentioned to you the flagrant lies about who retained the investigator.

* * * *

Mr. Sprayregen's attempt (sic) for keeping Umana around because of the accountants is just so much coverup and you just reject that.

* * * *

That is the most bald faced misrepresentation of a record of facts I can imagine.

* * * *

Mr. Sprayregen was not telling you the truth again, ladies and gentlemen.

* * * *

It is simply not true, ladies and gentlemen.

The Solicitor General confesses that this summation was improper and constituted prosecutorial misconduct, but argues that the misconduct should be excused on the ground that it did not "prejudice" the defendant.

The Solicitor General states:

> "While the prosecutor should not have stated that this inconsistency showed petitioner was ly-

ing, *since any such determination was for the jury to make*, it is obvious that petitioner was not prejudiced by these comments." [Emphasis added.]

Prosecutorial misconduct of the type evidenced in this case should not be countenanced upon the alleged ground that no "prejudice" resulted. A determination of "prejudice" is the most impossible of tasks. No one can safely say that a jury has not been poisoned by prosecutorial impropriety.

If such repeated prosecutorial excess is to be excused on the ground that purportedly no "prejudice" occurred, then no defendant may safely take the stand in his own defense.

The Solicitor General's assertion of no "prejudice" is unfounded in any event. The evidence against petitioner was both slim and suspect. Two witnesses, Umana and Spengler, testified against the petitioner. While each implicated petitioner in varying ways, in fact these two witnesses disagreed sharply in basic parts of their testimony. Umana, for example, accused Spengler and petitioner of participation in the falsification of the year-end 10-K and in an alleged subsequent cover-up. Spengler *denied* both of these allegations and exonerated petitioner in these respects (Tr. 571-572, 590-595, 602, 694-697, 744-746).

Further, Umana and Spengler testified prior to their sentencing pursuant to written plea bargain agreements. Thus, both witnesses were motivated to "trade-up" to their advantage by accusing their superior.

The bland statement that "documentary evidence supported their testimony at every turn" (Gov't. Mem. p. 4) is not supportable. For example, the Solicitor General's memorandum is simply incorrect as a matter of fact when it states that the petitioner's testimony was (Gov't. Mem. p. 2):

"flatly contradicted by documentary evidence in petitioner's own handwriting, which showed that he almost completely controlled every detail of the stores' operations (Govt. Exhs. 65, 113-116, 123, 135, 155-158,, 166). His denial of attendance at a restaurant meeting to plan the coverup was contradicted by his own charge account records (Tr. 2162; Govt. Exhs. 38, 146)."

The Solicitor General's Office also is incorrect when it asserts that the prosecutor's repeated inflamatory statements of personal opinion were "always preceded by a carefully constructed explanation showing there was a contradiction between a statement by petitioner and other evidence." (Gov't. Mem. p. 3).

While we cannot, in this reply brief, summarize the entire record, we believe it is enough to say that the trial judge, on two occasions, noted that the case was an extremely "close" case which turned on the credibility of the oral testimony (Tr. 1853, 2675-2676), and that the Court of Appeals found the determination of petitioner's guilt or innocence "was one dependent on the jury's assessment of credibility" (4a).

Undoubtedly, the Solicitor General's Office was in no position to fully familiarize itself with the lengthy record of a case it did not try. Indeed, it is precisely this appellate difficulty which provides yet another substantial reason why a claimed absence of "prejudice" should not provide a basis for excusing the type of repeated prosecutorial misconduct which occurred in this case.

Finally, if the prosecutor in this case, who did participate in the trial, himself believed that the evidence of guilt was as overwhelming as the Government now suggests, then why did that same prosecutor find it necessary

to resort on a repeated and consistent basis to a kind of impropriety which has been condemned consistently both in the Second Circuit and in other Courts of Appeal.

The Court of Appeals for the Fifth Circuit has reversed a conviction where a State prosecutor, in summation, resorted to similar tactics. *Houston* v. *Estelle*, 569 F.2d 372 (5th Cir. 1978).

The instant case itself represents at least the third occasion upon which the Court of Appeals for the Second Circuit has forbidden precisely such misconduct, although it always has excused that misconduct on the ground of no "prejudice". *United States* v. *White*, 486 F.2d 204 (2nd Cir. 1973), *cert. denied*, 415 U.S. 980 (1974); *United States* v. *Bivona*, 487 F.2d 443 (2nd Cir. 1973); *United States* v. *Sprayregen*, 577 F.2d 173 (2nd Cir. 1978). Clearly this is not, as suggested, a case involving mere *intracircuit* conflict.

We repeat what we said in our petition (Pet. p. 11):

> "We also believe that this Court should measure the adequacy of a system of judicial review which warns the United States Attorney against a repetition of specific misconduct, but then does not reverse convictions in subsequent cases when the precise misconduct recurs. Otherwise, defense counsel can have no confidence that future violations of appellate admonitions will not repeatedly be forgiven under the rubric of 'harmless error.' It is now impossible, for example, to make an informed decision as to whether a defendant may safely take the stand in his own defense without subjecting himself to the risk of character assassination, and of matching his credibility with that of an Assistant United States Attorney who may call him a liar in summation."

Either a federal prosecutor may call a defendant a "liar" on repeated occasions during summation in a federal criminal case, or a federal prosecutor may not do so.

We believe that is the issue in this case.

* * * * *

Except to the defendant, whose reputation is ruined and who presently is serving his one year in jail, this case might be considered "just another" case. Yet, the truth is that this case represents hundreds of cases—many of which are complex—which presently are being processed in the federal criminal justice system on an expedited basis. In a very real sense, the responsibility of adequate representation in such cases cannot be discharged when both trial and appellate courts excuse egregious prosecutorial misconduct with the easy conclusion that a jury of twelve lay persons was not "prejudiced" by the misconduct.

How can any court know whether a jury is "prejudiced" by misconduct? "Prejudice" is the most imprecise of concepts. How can courts consistently excuse blatant misconduct on the ground of "no prejudice," and still maintain and reflect the high—and indeed the required—standards of administering federal criminal justice?

Standards are important. They cut across our national system of justice. They impact our public attitudes towards justice and our courts. They are essential to the fair workings of our justice system, and, in that sense, are essential to the fabric of our society.

We submit, most respectfully, that this case deserves the attention of this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue a review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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